presence. His theories, if they could be put into practise, would end the government of the United States. * * * If the government considers his presence undesirable, because of his advocacy of a doctrine which it regards as inimical to civilization, it must have the power to send him out of the country, and back to the country whence he came."

An alien, according to the court, does not forfeit the right to partake of the hospitality of the country simply because he leans toward a particular creed or philosophy, or because of the ideas and thoughts he may entertain; but that privilege is forfeited when he attempts to disseminate ideas regarded by Congress as hostile to the institutions of this country, or gives utterance to such thoughts and seeks to instill them into the minds of others.

THE RIGHT OF A PRIVATE INDIVIDUAL TO SUE OUT A WRIT OF MANDAMUS WHERE THE QUESTION IS ONE OF GENERAL PUBLIC INTEREST.—It seems to be well settled that a private individual can sue out a writ of mandamus where he has a special interest in the result.[1] Where the relator is a taxpayer, there are many cases holding that he has a private, special right as a result of his direct pecuniary interest, aside from his interest as a member of the community.[2] But whether or not the taxpayer is affected specially in the payment of his own taxes, it is generally held that his interest is sufficient where, as a member of the general public, he sues out a writ compelling a public officer to perform certain ministerial duties which affect the whole community.[3] In New York, a relator, who was a citizen and taxpayer, attempted to sue out a writ of mandamus to compel the collection of a certain tax, and it was held that, inasmuch as the people themselves are the plaintiffs in a proceeding by mandamus against a public officer, it does not matter who the relator is, so long as his interest is common to the whole community.[4]

A mandamus will lie in most States to compel the performance of ministerial duties by a public officer, where the relator is a voter

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[1] Bryce *v.* Burke, 172 Ala. 219, 55 South. 635, containing *dicta* to the effect that the individual need not have a special interest, if the case be one of public interest; Napier *v.* Poe, 12 Ga. 170.

[2] State *ex rel.* Coe *v.* Fyler, 48 Conn. 145; Decatur County Commissioners *v.* State, 86 Ind. 8, upholding Hamilton *v.* State *ex rel.* Bates, 3 Ind. 452.

[3] In State *v.* Weld, 39 Minn. 426, 40 N. W. 561, relators were freeholders, taxpayers and voters; in Lay *v.* Common Council of Hoboken, 75 N. J. L. 315, 67 Atl. 1024, relator was citizen, resident and owner of taxable real estate therein; so in Hummelshime *v.* Hirsch, 114 Md. 39, 79 Atl. 38, relator was citizen, voter and taxpayer; Hyatt *v.* Allen, 54 Cal. 353; State of Nevada *v.* Gracey, 11 Nev. 223 (writ dismissed on other grounds). See note in 28 Am. Rep. 448.

[4] People *ex rel.* Stephens *v.* Halsey, 37 N. Y. 344, approving People *v.* Collins, 19 Wend. (N. Y.) 56.

and the public as such is interested.[5] Generally, in the absence of statute, it is probable that the proceedings can be brought either in the name of the State on the relation of the individual or directly in the name of the individual.[6] It has been held that the writ would lie upon the application of a private individual where the question was one *publici juris,* even though it involved the sovereignty of the State and its prerogatives.[7] But where the record did not show that the relator was an inhabitant or citizen of the State, and the State was affected in its sovereign capacity, a writ to compel a justice of the peace to cause an alleged criminal to be brought to justice was refused.[8]

It is difficult to see the reason for permitting an individual, who is a taxpayer or voter, to sue out such a writ, while not allowing this privilege to an individual, who is alleged merely to be a citizen and member of the community, if the remedy is for the benefit of the community, and there is no provision compelling a public officer to perform the duties in controversy. It is therefore generally held by the great majority of our courts that a citizen, who is interested in the enforcement of the laws, and who, as a member of the community which is affected by these laws, sues for the benefit of himself and the public, is a proper party, and the writ will lie on his petition.[9]

That a private citizen, showing no special interest in the subject-matter other than the interest felt by the public generally, may sue out a writ of mandamus to compel public officers to comply with a mandatory statute, has been decided in Kentucky, in the recent case of *State Text-Book Comm.* v. *Weathers,* 213 S. W. 207.[10]

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[5] In Kimberly *v.* Morris, 87 Tex. 637, 31 S. W. 808, it was held that a voter, who had complied with the requirements of a Texas statute in affixing his name to a petition requesting an order of election, could sue out a writ of mandamus compelling the public officer to obey the statute; so in State *v.* Brown, 38 Ohio St. 344, the relator was held to be the proper person to sue out a writ compelling the issuance of a proclamation for a political election, where he was a citizen and elector. That a relator, who was a resident elector of the district concerned and had a family of minor children entitled to school privileges therein, could sue out such a writ compelling the school trustees of his district to perform certain duties as to building a schoolhouse, was held in Eby *v.* Board of School Trustees, 87 Cal. 166, 25 Pac. 240, completely overruling the holding to the contrary in Linden *v.* Alameda County Suprs., 45 Cal. 6, which has been frequently, but erroneously, cited as the modern California holding.

[6] Kimberly *v.* Morris, *supra.* See also the *dictum* upholding the doctrine in O'Brien *v.* Board of Aldermen of Pawtucket, 18 R. I. 113, 25 Atl. 914, which holds *contra* on the right of the individual to sue out the writ in the absence of special interest. Under statute it was held in Moses *v.* Kearney, 31 Ark. 261, that the proceedings must be brought in the name of the State.

[7] State *v.* Harmon, 23 N. D. 513, 137 N. W. 427.

[8] Nickelson *v.* State, 62 Fla. 243, 57 South. 194.

[9] Union Pacific R. Co. *v.* Hall, 91 U. S. 343, affirming 3 Dill. 515, 11 Fed. Cas. 268.

[10] Six judges sat; three dissented on this question.

The Kentucky decision seems to be in accordance with the modern rule and is supported by the highest authority,[11] although some old decisions, and at least one modern decision,[12] are to the contrary. In Maine [13] it was decided that such a writ could only be sued out by the proper public officer, and there seems to be no decision in that State overruling this holding. The Maine case was based upon an English case,[14] which involved a question of private right and not of public duty under a mandatory statute.

In an early case in Massachusetts [15] there are dicta agreeing with the holding in Maine, but the actual point, as to who the relator may be, was not decided. A more modern case [16] in the same State, not turning on the same point, has some strong *dicta* entirely abrogating the *dicta* in the earlier case, and holds with the Kentucky case.[17] Pennsylvania [18] bases its holding *contra* upon the early decisions in Maine [19] and Massachusetts; [20] the former, as has been seen, based upon an erroneous conception of an English case, and the latter containing only *dicta* in regard to the point decided by the Kentucky case. At first, Michigan [21] followed the lead of the early cases in Maine [22] and Massachusetts.[23] But more recently the Michigan court has modified its earlier decision and has allowed a private citizen to sue out a writ of mandamus, where the public officer who ordinarily functioned for that purpose was opposed to the application.[24] In the Territory of Dakota [25] it was held that a non-resident citizen, though a taxpayer, could not sue out a writ of mandamus in the absence of a particular private right apart from the right and interest held by the public generally.

Perhaps the strongest case upholding the minority view is in

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[11] Union Pacific R. Co. *v.* Hall, *supra.*

[12] O'Brien *v.* Board of Aldermen of Pawtucket, *supra.*

[13] Sanger *v.* County Commissioners of Kennebec, 25 Me. 291, cited and approved in Mitchell *v.* Boardman, 79 Me. 469, 10 Atl. 452. The latter case did not turn absolutely on the qualifications of the relator to bring the suit, and the writ was refused under peculiar circumstances. It was also cited and approved in Robbins *v.* Bangor, etc., R. Co., 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963, though the petition was dismissed on other grounds, and the court did not decide this point.

[14] Rex *v.* Merchant Tailors' Company, 2 B. & Ad. 115.

[15] Wellington's Case, 33 Mass. (16 Pick.) 87, 26 Am. Dec. 631.

[16] Attorney General *v.* Boston, 123 Mass. 460, 479.

[17] See note 10, *supra.*

[18] Heffner *v.* Commonwealth, 28 Pa. St. (4 Casey) 108.

[19] See note 13, *supra.*

[20] See note 15, *supra.*

[21] People *ex rel.* Russell *v.* State Prison, 4 Mich. 186. This case was followed in People *v.* Green, 29 Mich. 121, in a very short opinion by the court, with no citations.

[22] Sanger *v.* Comm. of Kennebec, *supra.*

[23] See note 15, *supra.*

[24] Giddings *v.* Sec. of State, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402.

[25] Territory *ex rel.* Graves *v.* Cole, 3 Dak. 301, 19 N. W. 418.

Rhode Island.[26] In this case the early decisions in Pennsylvania, Massachusetts and Maine are cited and approved, and the reason given for the court's sanction of the doctrine is that:

> "Public officers are appointed to enforce the laws. It is presumed that they will do their duty. If they omit to do it, application can be made to the proper official to compel them to do it. But in the first instance the duty to move in the enforcement of a public right should be upon a public officer. This is not only more consistent with our form of government, and more orderly in its method, but it prevents the annoyance and expense which would be incident to a rule allowing any citizen to be a prosecutor."

Here the court discusses the issuance of a writ of injunction to a private individual to abate a public nuisance, considering it to be analogous to the right to sue out a mandate to compel a public officer to perform his duties, and holds that neither writ would lie upon a suit of a private individual in the absence of special interest. The learned judge continues:

> "Successive suits might therefore be brought by different persons, even though the first suit should show that there was little or no prospect of success."

Mr. Justice Strong, in a leading case decided in the United States Supreme Court,[27] answers this holding as follows:

> "An application for mandamus, not here a prerogative writ, has been supposed to have some analogy to a bill in equity for the restraint of a public nuisance. Yet, even in the supposed analogous case, a bill may be sustained to enjoin the obstruction of a public highway, when the injury complained of is common to the public at large and only greater in degree to the complainants * * *. The principal reasons urged against the doctrine are that the writ is prerogative in its nature—a reason which is of no force in this country and no longer in England—and that it exposes a defendant to be harassed with many suits. An answer to the latter objection is, that granting the writ is discretionary with the court, and it may well be assumed that it will not be unnecessarily granted."

The doctrines of Arkansas,[28] Illinois,[29] Montana,[30] probably

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[26] O'Brien *v.* Board of Aldermen of Pawtucket, *supra.*
[27] Union Pacific R. Co. *v.* Hall, *supra.*
[28] Moses *v.* Kearney, *supra.*
[29] County of Pike *v.* People, 11 Ill. 202, affirmed in City of Ottowa *v.* People, 48 Ill. 233, and in Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824.
[30] Chumasero *v.* Potts, 2 Mont. 242.

Alabama,[31] Kansas,[32] Oregon,[33] Missouri,[34] Virginia,[35] Iowa,[36] Louisiana [37] and probably Massachusetts [38] are in absolute accord with the holdings of the Supreme Court of the United States [39] and of the recent Kentucky case,[40] and seem to completely outweigh in reason and principle the ancient doctrine of the minority courts.

BURDEN OF PROOF IN THE DEFENSE OF INSANITY.—The term "burden of proof" has two distinct meanings. In its first sense it denotes the duty of establishing the truth of a given proposition or issue by such a *quantum* of evidence as the law demands in the case in which the issue arises. This duty is technically spoken of as the "risk of non-persuasion of the jury," and differs in civil, as distinguished from criminal cases, only in the *quantum* of evidence required. In civil cases this is a mere preponderance of evidence, while in criminal cases there must be proof beyond a reasonable doubt. As used in its other sense the term "burden of proof" means the duty of producing evidence at the beginning or

[31] See *dictum* in Bryce *v.* Burke, *supra.*

[32] Cartwright *v.* Board of Education of City of Coffeyville, 73 Kan. 32, 84 Pac. 382, an interesting case. Writ of mandamus was issued compelling the admission of a negro girl into the same room with white pupils, although there was a separate room for negroes, and the relator, the father of the girl, was alleged merely to have been a citizen of the United States and a resident of the city, where the school was located.

[33] Crawford *v.* District School Board, 68 Ore. 388, 137 Pac. 217, was decided the same way under practically the same circumstances as the Cartwright case, cited in note 32, *supra,* except that relator's children in the Oregon case were half Indian.

[34] State *v.* Francis, 95 Mo. 44, 8 S. W. 1, held that an interest by a private citizen in the enforcement of the laws was all that was necessary in order to allow the relator to sue out the writ.

[35] Richmond, etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775, citing Union Pacific R. Co. *v.* Hall, *supra,* with approval. The relator, a citizen of Henrico County, petitioned for writ to compel the street car company to allow a transfer from one car to another, without paying a second fare.

[36] State *ex rel.* Rice *v.* Judge of Marshall County, 7 Iowa 186, where there is no allegation that the relator was a taxpayer or had any special interest in compelling the performance of the acts petitioned for. This case was expressly affirmed and approved in State *v.* Bailey, 7 Iowa 390.

[37] Watts *v.* Police Jury of Carroll, 11 La. Ann. 141, where the sole ground for the application for the writ was that the relators, who lived in the parish affected, were inconvenienced by the location of the courthouse, which a statute had ordered changed.

[38] See Attorney General *v.* Boston, *supra,* where the court approved the right of an individual to sue out such a writ, even in the absence of special interest, in a matter of public concern, though the point was not involved directly in the case.

[39] Union Pacific R. Co. *v.* Hall, *supra.*

[40] State Text-Book Comm. *v.* Weathers, *supra.*